No. 93-1171

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ROBIN R. MOERMAN,
Petitioner,
v.

STATE OF CALIFORNIA, Director of the Department of Fish and Game of the State of California; and DOES I THROUGH IX, INCLUSIVE,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeal, State of California, First Appellate District, Division One

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AMICUS CURIAE BRIEF OF WASHINGTON STATE FARM BUREAU, WASHINGTON STATE GRANGE WASHINGTON CONTRACT LOGGERS ASSOCIATION AND NORTHWEST LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The Washington State Farm Bureau is an association composed of 10,000 farmers located in the state of Washington. Most members are family farms and most own their land. The Farm Bureau believes that the productive use of America's land resources must be protected and enhanced and believes that recognition of the rights

of individuals who invest their energy and resources in the development of their property is essential. Proposals to relocate the grey wolf into areas of Washington from which it is absent as well as proposals to reestablish grizzly bear populations are currently being considered in Washington State. These carnivorous animals, once relocated, cannot be prevented from killing and consuming sheep, calves and other livestock, thus seriously injuring members of the Farm Bureau.

The Washington State Grange is a membership organization composed of farmers and rural townspeople located throughout the state of Washington. Grange members are concerned with the increasing impact which government regulations have upon their ability to continue their gainful employment. As small landowners, many of them would be effectively put out of their farming business if wolves and grizzly bears and other wild animals are established in their locality by governmental action.

Washington Contract Loggers Association is an association of 600 small, family owned and operated logging companies in Washington State who collectively employ 7,000 employees and who conduct 90% of the commercial logging operations in Washington on public and private lands. Many members also have invested their savings in forest lands, typically owning between 100 and 500 acres, lands which they hold as long term investment for retirement. The Contract Loggers Association is concerned with land management policies which fail to recognize the rights of individuals who own land and who earn their living from the land. They see their livelihood and investments at risk from proposals for the relocation of wild animals including grizzly bears and wolves to forested areas in Washington from which they have long been absent.

The Northwest Legal Foundation is a nonprofit, public interest law firm, which focuses on litigation concerning

civil rights associated with ownership and use of private property, and is supported by approximately 600 members, primarily in Washington State. The decision below affects the fundamental rights of property owners to the productive use of their land.

If the decision below is allowed to stand, it will be used as authority for the proposition that the State of Washington can act to prevent the beneficial use of land in Washington without just compensation.

SUMMARY OF ARGUMENT

The decision below wrongly holds that governments may introduce wild animals into a settled agricultural community without responsibility for the depredations caused by those animals or the economic destruction of the productive use of property caused by the animals after relocation.

The case below deals with relocation of tule elk into a habitat from which they have been absent for over a century. Since a herd of over one hundred 700-pound animals consume a lot of forage, the pastures developed over the years for domesticated animals have been invaded by elk and are being diverted from their established use to serve a public purpose. Although it is society at large whose policies are being implemented, the economic burden is being borne solely by Mr. Moerman and similarly situated neighbors.

In other parts of the country, efforts to create new habitat for grizzly bears, wolves, lynx and other predators will present similar questions of law. The final outcome of the Moerman case will, therefore, have application to property rights throughout the West, if not throughout the nation.

The California court wrongly decided the case, placing its primary reliance upon cases where the role of the government had been a passive one, preventing hunting

of animals in their existing habitat, rather than the active role involved in Moerman, exercising control over animals to establish them in a new habitat, in conflict with existing uses of the land.

Prior cases of this Court, ignored by the court below, are consistent with the proposition that governmental actions destroying the suitability of land for its existing uses constitute inverse condemnation and entitle the landowner to compensation.

STATEMENT OF ISSUE FOR REVIEW

Where a governmental agency, through its physical control of wild animals, changes the century-old patterns of animal depredation, substantially adversely affecting the economic uses of real property and upsetting the settled expectations of landowners, has a compensable taking occurred.

ARGUMENT

The preservation of the diversity of wild animals which once roamed freely across our land—elk, grizzly bears, wolves and the like—is a goal our society has determined to be desirable. That goal is achieved in many ways, usually through restrictions on development of lands to maintain existing habitat and through prohibitions of hunting of certain species.

In recent years, some governments have gone beyond actions designed to protect animals where they currently exist. In order to increase the numbers and range of certain wild animals, governments have considered transporting breeding populations into new areas or areas from which the animals have long been extinct. The introduction of large voracious herbivores or carnivores into a new area inevitably has a major impact upon the uses to which the land can be put, frustrates the legitimate expectation of landowners, and disrupts settled economic uses of the land.

Tule elk is a clear example. Grizzly bears and grey wolves which are proposed to be reintroduced into areas of Western Washington would be a similar example.

The question posed by this case is: who should bear the cost: should the economic detriment of relocation be spread throughout the society whose policies are being implemented, or should it be concentrated on a few landowners whose use of their property will be significantly affected?

I. THE IMPORTANCE OF THE CASE JUSTIFIES REVIEW.

The ultimate determination of this case will determine the application of the Takings Clause to transformations in land use resulting from the relocation of wild animals by governments, a practice increasingly under consideration by policymakers desirous of extending the habitat of large herbivores and carnivores.

The effects of the relocation of nearly a hundred elk upon the established use of land is set forth in the Petition for Writ of Certiorari. Amici are concerned about the comparable effect of establishing new populations of grizzly bears or wolves upon farming, timber culture and other long-established uses of privately-owned land in Washington State.

As society's efforts to protect wildlife are transformed from passive regulations, such as limitations or prohibitions on hunting and restrictions on changes in land use, to active efforts by governments themselves as the agents of change, the conflict of rights between society at large and specifically affected property owners will occur with increasing frequency.

For example, farmers located within a several mile radius of forest land into which the grey wolf may be introduced face the reality that wolves will not confine their predatory activities to public lands or to their nat-

ural prey. Sheep, cattle, and other domesticated livestock will inevitably be the dinner of choice for these predators.

Likewise, each of the 600 members of the Washington Contract Loggers Association face the reality that establishment of grizzly bears in Western Washington would inevitably be accompanied by prohibition of cultivation of the forest lands—both these holdings members own as personal investments for their retirement and those from which they and their 7,000 employees draw their living.

Were California to condemn Mr. Moerman's land for elk forage, doubtless all would agree a taking has occured. Likewise, were the State of Washington to requisition one hundred sheep to provide food for wolves, compensation would be paid. Should a similar result be reached where no formal declaration of taking occurs but the government's action directly and predictably has the same impact upon property owners? The question is an unresolved issue of constitutional law which should be settled by this Court.

II. THE COURT BELOW WRONGLY DECIDED THE CASE.

A. In Finding That "Tule Elk Are Not Instrumentalities of the State Nor Controlled by the State" the Court Below Ignored Significant State Action.

The court below relied on a long series of cases holding that wild animals in their natural state are not instrumentalities of the state. Further the court concluded that the tule elk, at the time of damaging Moerman's property, were not under the control of the state. By focusing on whether tule elk were under the control of the state at the moment of their foraging, the court below focused on the wrong question and, not surprisingly, reached the wrong result.

One need not reject the statements of the court below regarding wild animals below to reject its analysis. It is

not, in fact, the nature of wild beasts that is at issue in this case. It is the nature of state action affecting those wild beasts.

The court below acknowledged that the state did control the elk, albeit "only for a day." But the actions of the state during that one day are the direct and proximate cause of the damages suffered by Moerman. The state did not capture and release *in situ*; it captured, transported substantial distances, and released a herd of 95 elk into an entirely new habitat. But for that action Mr. Moerman would not be involuntarily providing forage to the elk herd from the pasture designed to feed his sheep and cattle.

Surely the law cannot be that the consequences of governmental action can be so easily ignored. The National Zoo in Washington, D.C. contains many wild animals captured and relocated to Washington. They are, at the moment, under the control of federal authorities which pay for their food. If the zoo authorities were to decide to open all cages and allow lions and bears to roam freely, the animals would, from that point forward, no longer be under the "control" of the zoo. The arguments made by California, that it has no responsibility for the actions of wild animals previously controlled by it but no longer under its control could be advanced equally by the zoo authorities. But surely they could not so easily avoid responsibility for depradations caused by the animals they relocated and released. The prior control coupled with a release into a new habitat is a state action for which government should be held accountable.

B. Cases Dealing With Governmental Action to *Protect* Wild Animals Do Not Establish Law Applicable to Government Action to *Relocate* Wild Animals.

The court below states that the majority of courts have held that government is not liable for damages to property caused by protected wildlife (Opinion, p. 6). Thus, the government has not been found responsible for depre-

dations of grizzly bears which it has never controlled, *Christy v. Hodel,* 857 F.2d 1324 (9th Cir. 1988), *cert. denied,* 490 U.S. 1114 (1989); nor for failing to assert control over wild horses. *Mountain States Legal Foundation v. Hodel,* 799 F.2d 1423 (10th Cir. 1986), *cert. denied,* 480 U.S. 951 (1987).

But relocation programs are different for two reasons: first, the government has taken specific, concrete actions not to preserve but to change the status quo; second, the result is to significantly disrupt settled economic uses of the land, contrary to the reasonable expectations of landowners.

Thus, in *Christy v. Hodel, supra,* plaintiff leased land in existing grizzly bear habitat immediately adjacent to Glacier National Park. When the bears acted in accordance with their nature and began killing his sheep, Christy responded by killing a bear in violation of the Endangered Species Act. Christy then sought a determination that the U.S., solely by protecting grizzlies from slaughter, had "taken" his land.

But the grizzlies were there first. Christy knew, or should have known, that he was locating his sheep ranch in grizzly bear habitat. In rejecting Christy's claim that his property had been taken, the Ninth Circuit acknowledged that the Fifth Amendment was designed to avoid shifting a burden which should be borne by the public as a whole to a few property owners but then declared that the regulations involved did not "force" Christy to bear any burden. *Id.* at 1335. Christy voluntarily assumed that burden when he attempted to move his sheep into grizzly country. It was Christy who sought to change the status quo.

Likewise, in *Mountain States Legal Foundation v. Hodel, supra,* plaintiffs sought to change the status quo by requiring the government to remove free-roaming wild horses from range land under private ownership, contend-

ing that legislation which prevented private hunting of the wild horses constituted a taking of property.

Again, the horses were there first. The landowners who sought to use their land for grazing had introduced stock in competition with the wild horses and with knowledge that the horses were, in fact, roaming free. All the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340 (1982) did was to prohibit their slaughter.

Today, property owners like Moerman face something entirely different. Moerman did not develop his ranch in competition with a herd of 700-pound hungry elk, but rather in an area where elk had been extinct for a century. He accepted the business and financial risks of weather and market, but he did not reasonably foresee that the State of California would introduce a herd of elk as his new neighbors to forage off his pasture.

Just as Christy's reasonable expectations regarding the use of his property were defined by the existing state of affairs, so should Moerman's be. While Christy should not be able to require the government to change the status quo or to pay him, Moerman was content with the status quo. He seeks to be paid for the effect of California's changes in the status quo.

III. THIS CASE IS APPROPRIATE TO CONSIDER UNDER THE FIFTH AMENDMENT.

Where property has not been appropriated by the government, this Court has nevertheless held that the constitutional compact contained in the Takings Clause will still require compensation of the governmental action which deprives the owner of the economic use of the property "suggest[s] that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole." *Yee v. Escondido,* 503 U.S. ——, 112 S. Ct. 135, 118 L. Ed. 2d 153, 162 (1992). It is clear that total deprivation of the economic use will support compensation, *Lucas v. South Carolina*

Coastal Council, 505 U.S. ——, 112 S. Ct. 2886, 120 L. Ed. 2d 978 (1992), but far less than total deprivation has been required where the government interferes with legitimate current use.

Where the government's action makes land no longer suitable for its traditional uses, a taking has been found. *U.S. v. Causby,* 328 U.S. 256 (1946). Thus, in the case which became the progenitor of "inverse condemnation" low flying military planes disrupted the Causby's chicken ranch and forced them to abondon the use of their property as a commercial chicken farm the Court concluded that a taking had occurred. Total destruction of economic value was not required; it was sufficient that the government's action had destroyed the land for its current use. The Court held that the proper measure of damages was the diminished market value, reflecting a comparison between current use and the use to which the land could be converted. *Id.* at 261.

Nor does the argument below that animals are not the instrumentality of the government, and therefore it is not government which destroys value, dispose of the case. A similar argument was advanced in *Griggs v. Allegheny County,* 369 U.S. 84 (1962) where plaintiffs claimed damages from excessive noise and vibration in connection with operation of an airport. The County argued that the noise came from the airplanes owned by airline companies not the airport itself. The Court rejected that argument holding that the County which designed and operated the airport had responsibility for the consequences of its actions. *Id.* at 89. It was not necessary to find that the airlines were the agents or instrumentalities of the County. Similarly here, one need not assert that California had continuing "control" over elk; it is sufficient that the damages suffered by the landowner are the natural consequences of the government's prior control.

CONCLUSION

The relocation of wild animals and their introduction into new habitat has a substantial effect upon property owners. What has occurred to Mr. Moerman with the relocation of tule elk would occur to farmers, tree farmers, and loggers throughout Washington if wild animals are relocated in Washington.

The Supreme Court has not spoken to the circumstances under which such governmental actions will constitute a taking. The Moerman case presents the issues clearly and the outcome will resolve an issue which is likely to be replicated across the West and perhaps across the nation.

Respectfully submitted,

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